

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-2145

To be argued by
DANIEL J. BELLER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2145

DOMINICK ROMANO,
Petitioner-Appellant,

UNITED STATES OF AMERICA,
Respondent-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

**DANIEL J. BELLER,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.**



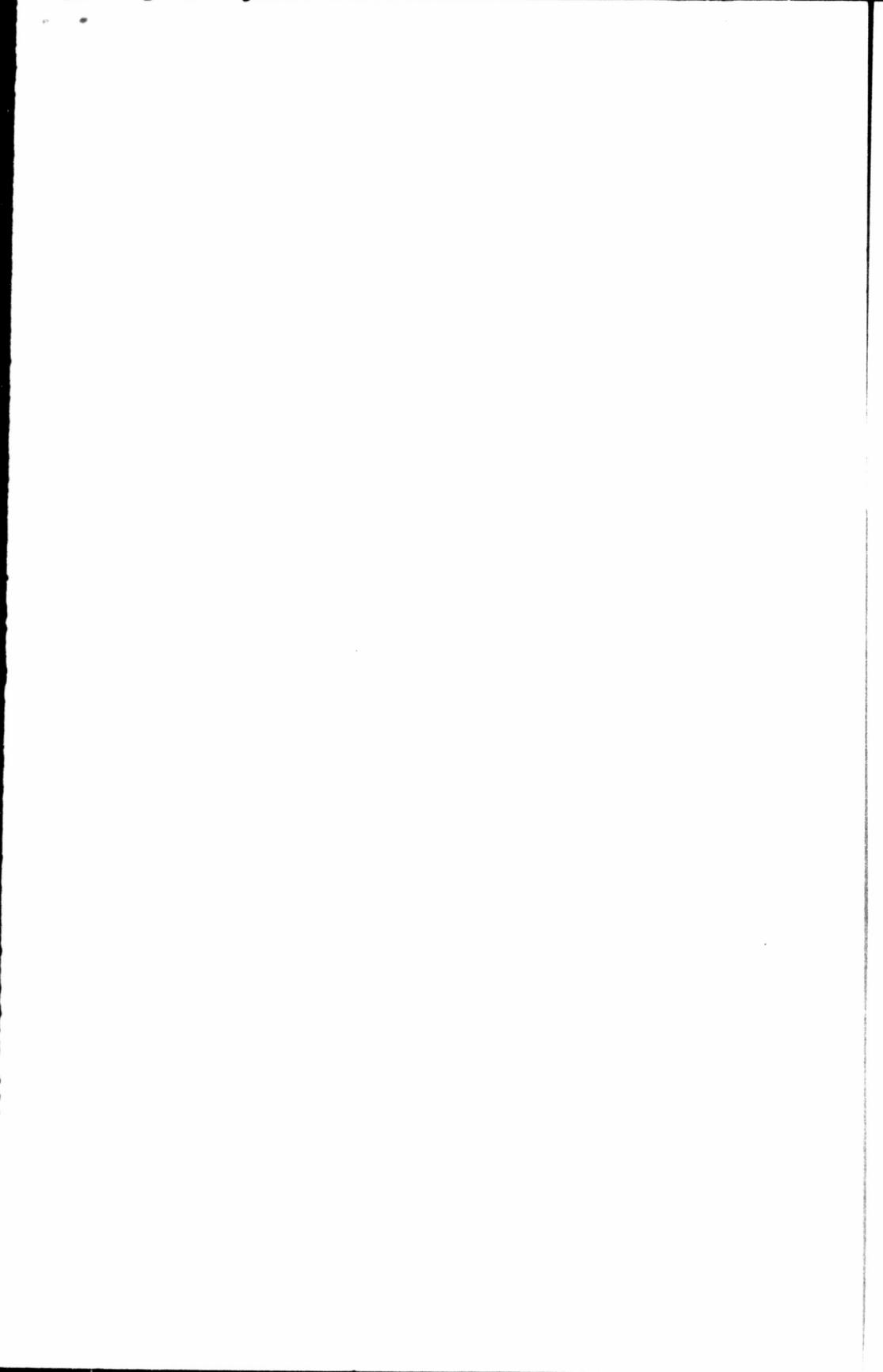


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Docket No. 74-2145

DOMINICK ROMANO,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Dominick Romano appeals from an order entered on July 25, 1974, in the United States District Court for the Southern District of New York, by the Honorable Lloyd F. MacMahon, United States District Judge, denying without a hearing his motion, pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and twenty-year sentence imposed thereon on April 15, 1969.

Indictment 64 Cr. 828, filed on September 30, 1964, charged petitioner Dominick Romano and eleven other defendants, together with sixteen named co-conspirators in a single count with conspiracy to violate the federal narcotic laws, 21 U.S.C. §§ 173 and 174. Petitioner, his brother Arnold Romano, Frank Sherbicki and Carmine Guanti were fugitives at the first trial under the indictment, which commenced on May 3, 1965 before the Honorable Dudley

B. Bonsal and a jury.* After the conclusion of the first trial, defendants Sherbicki, Guanti, Arnold Romano and petitioner, Dominick Romano, were apprehended. Their trial commenced before the Honorable Lloyd F. MacMahon and a jury on March 3, 1969, and concluded on March 14, 1969, with a verdict of guilty as to each of the four defendants. On April 15, 1969, Judge MacMahon sentenced petitioner to 20 years imprisonment and imposed a \$5,000 committed fine. Romano's conviction was affirmed by a unanimous panel of the Court of Appeals, *United States v. Guanti*, 421 F.2d 792 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970) and he is presently serving his sentence.

On June 18, 1971, Romano filed a petition, *pro se*, pursuant to Title 28, United States Code Section 2255, for an order vacating his conviction and sentence. That petition, as subsequently amended by retained counsel, was denied in all respects without a hearing in a memorandum opinion, MacMahon *J.*, entered on January 5, 1972 (A. 16-34).** The decision was affirmed by a unanimous court, *Romano v. United States*, 460 F.2d 1198 (2d Cir.), *cert. denied*, 409 U.S. 915 (1972) (A. 35-37).

On February 25, 1974, Romano filed this second petition, pursuant to Title 28, United States Code, Section 2255. In an order entered on July 25, 1974, Judge MacMahon denied this petition without a hearing on the ground that it was a "successive" petition and alternatively on the ground that the claims asserted were frivolous.

* The first trial (the "Armone trial") resulted in the conviction of four defendants and the acquittal of two. The judgments of conviction were affirmed on appeal in *United States v. Armone*, 363 F.2d 385 (2d Cir.), *cert. denied*, 385 U.S. 957 (1966).

** "A." refers to Appellant's appendix; "Br." to Appellant's Brief; "GA," to the Appendix to the Government's memorandum of law submitted in opposition to the petition in the District Court.

Statement of Facts

For a full statement of the facts in this case the Government respectfully refers this Court to the opinion of the United States Court of Appeals in *United States v. Guanti, supra*, 421 F.2d at 794-795, 797-799, and to the Government's brief in that appeal at pp. 3-22 (Docket Nos. 33632-33635). In essence, the evidence at trial showed that petitioner, with the other co-defendants and co-conspirators, participated in a single conspiracy from 1956 to 1960 to import enormous quantities of heroin from France and to distribute these narcotics in the United States after importation. The conspiracy was vertically structured involving French exporters and American-based importers and distributors linked by a network of couriers.

The nature of the conspiracy and the roles of the various defendants and co-conspirators was succinctly summarized in *United States v. Guanti, supra*, 421 F.2d at 797 as follows:

"[A] heroin export group existed in France consisting of Barnier (Paris), the Aranci brothers (Marseilles) and another (not named). They used as couriers to bring the heroin into this country Bourbonnais (an airline purser), Aspelund (a merchant seaman), Roulet (an airline employee), Henri-pierre (who accompanied Roulet), Rosal (Guatamalan Ambassador to Benelux countries) and Tarditi. The couriers delivered the heroin to an import group consisting at various times of Cahill, Arnold Romano, Dominick Romano, Hedges, Armone, Calamaris, Grammauta, and Sherbicki. To put the heroin into the hands of a wholesaler group, that group used the defendant Guanti as a conduit. The Government alleged that this conspiracy continued from 1956 through 1960. The money for the heroin was paid by the wholesalers to various members of the import group. In Aspelund's case, Cahill paid

him and he in turn paid Aranci less a delivery commission. Bourbannais was likewise paid by Cahill. Subsequently Hedges became associated with Cahill and would receive payments which he would turn over . . . to Cahill, Grammauta, Armone, Calamaris, Arnold Romano or Sherbicki."

Clarence Aspelund, Charles Bourbannais and Charles Hedges, three of the participants in the conspiracy, testified for the Government at both the Armone and the Romano trials.

ARGUMENT

POINT I

The petition was properly dismissed as a second or successive motion for similar relief, Title 28 U.S.C. Section 2255.

The instant petition, like its forerunner, charged serious misconduct on the part of Government witnesses, Government attorneys and Government agents, including allegations of perjury, subornation of perjury and wilful suppression of material evidence.* Petitioner made no effort

* In the petition filed below and in his memorandum of law in support, Romano also alleged prejudicial error in the Government's summation and in the introduction of certain testimony at trial (A. 5-6, at ¶¶ 22, 25). Neither issue is properly the subject of consideration by way of collateral attack upon a conviction under 28 U.S.C. § 2255, since they could have been raised on trial and on direct appeal, but were not, thus evidencing a deliberate by-pass of these procedures. *Kaufman v. United States*, 394 U.S. 217, 227 n. 8 (1969); *United States v. West*, 494 F.2d 1314, 1315 (2d Cir. 1974); *Sunal v. Large*, 332 U.S. 174, 178-179 (1947); *Genovese v. United States*, 378 F.2d 748, 749 (2d Cir. 1967); *United States v. Abbinanti*, 338 F.2d 911, 912 (2d Cir. 1960); *Kyle v. United States*, 266 F.2d 670, 674 (2d Cir.), *cert. denied*, 361 U.S. 870 (1959). Romano appears to have abandoned these claims on this appeal.

to substantiate these allegations, which rest wholly upon speculation and a basic misunderstanding of the governing legal principles. Furthermore, Romano openly conceded below that "this motion constitute[s] a resubmission of the issues presented in petitioner's prior motion to vacate sentence" (A. 3, at ¶ 15), and offered no explanation why the issues presented in this motion were raised neither on appeal from petitioner's conviction nor litigated in the previous proceeding under 28 U.S.C. § 2255. Accordingly, the instant petition is a "second or successive motion for similar relief on behalf of the same prisoner," 28 U.S.C. § 2255, which the District Court, in the exercise of sound discretion, properly dismissed.

Section 2255 provides that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." Here, petitioner "challenged the validity of his guilty plea on the same legal basis asserted in his first motion . . . He has now merely asserted new facts to support his claim . . . Furthermore, these 'new' facts, from their very nature, were known to petitioner when he filed his first motion and he has offered no explanation for not including them at that time." *Del Piano v. United States*, 427 F.2d 1156, 1157 (3d Cir. 1970).

Romano's second petition urged three grounds for relief: perjury on the part of Government witnesses (A. 4-5, at ¶ 16, 20); deliberate suppression by the Government at trial of evidence favorable to the defendant (A. 4-5, at ¶¶ 17, 18, 19 and 21); and Government subornation of perjury (A. 4-5, at ¶¶ 17, 18, 19 and 21). The District Judge, however, previously considered and rejected petitioner's application for relief based on identical claims, *see Memorandum Opinion, MacMahon, J.*, 71 Civ. 2851, filed January 5, 1972, at 7-12 (perjury and subornation of perjury) (A. 20-24); and 16-18 (Government's deliberate suppression of material favorable to the defendant) (A.

27-28). “[N]othing in § 2255 requires that a sentencing court grant a hearing on a successive motion alleging a ground for relief already fully considered on a prior motion and decided against the prisoner.” *Sanders v. United States*, 373 U.S. 1, 9 (1963).

Sanders establishes the standards for measuring the effect of a prior denial of an application for federal collateral relief on a second such petition. In *Sanders*, the Supreme Court said:

“Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.” *Sanders v. United States, supra*, 373 U.S. at 15.

Under the controlling principles announced in *Sanders*, the instant petition was properly dismissed. Romano's second motion was, in his own words, “a resubmission of the issues presented” in the previous § 2255 motion. The claims of perjury, subornation of perjury and suppression of material favorable to the defense were the same grounds presented in the prior application. “[T]hat petitioner has alleged an additional fact to support the same ground is immaterial,” *Wapnick v. United States*, 313 F. Supp. 183, 186 (E.D.N.Y. 1969), *aff'd*, 423 F.2d 1361 (2d Cir.), *cert. denied*, 400 U.S. 845 (1970); *see Sanders v. United States, supra*, 373 U.S. at 16; *United States ex rel. Wilson v. Follette*, 438 F.2d 1197, 1198 (2d Cir.), *cert. denied*, 402 U.S. 997 (1971); *Wilcording v. Swenson*, 446 F.2d 553, 554 (8th Cir. 1971); *Simmons v. United States*, 437 F.2d 156, 159 (5th Cir. 1971), since the alleged errors were known or should have been known at the time of the prior application. Moreover, the prior determination was

on the merits as both this Court's and the Court of Appeals' decision clearly state. See *Williams v. United States*, 481 F.2d 339, 345 (2d Cir.), *cert. denied*, 414 U.S. 1010 (1973).* Finally, Romano made no showing that redetermination would serve the ends of justice, a burden that is his to carry, *Sanders v. United States*, *supra*, 373 U.S. at 16-17. Petitioner has had a full and fair trial, an appeal from his conviction, consideration on the merits of his claim for post-conviction relief as well as an appeal from that decision. The Government respectfully submits that the ends of justice have been fully served in this case.

POINT II

The petition was properly dismissed as frivolous and is without merit.

Romano alleged several items of prejury at his trial in support of his petition. Judge MacMahon properly concluded that these claims were frivolous.

A. Aspelund's Alleged Perjury

Petitioner charges the Government with the knowing use of perjured evidence with respect to the testimony of Clarence Aspelund, a seaman, who served as a narcotics courier for the conspiratorial enterprise. According to petitioner, Aspelund testified at trial that his last delivery

* Romano appears to be of the view that an issue cannot be decided on the merits under 28 U.S.C. § 2255 without a hearing. Accordingly, he argues that since the first petition was denied without a hearing, the determination was not on the merits. The rather remarkable premise upon which this argument rests fails to take into account, among other things, the judgment of this Court affirming the denial of the prior petition, when it said: "In the papers submitted in support of his motion to vacate his judgment of conviction, appellant alleges that the prosecutors knowingly used perjurious testimony at his trial. *This claim is without merit*" (emphasis added). *Romano v. United States*, *supra*, 460 F.2d at 1199.

of drugs—to Cahill and Hedges—occurred “close to the end of 1959,” “close to Christmas,” whereas at a previous trial, *United States v. Cianchetti*, (U. S. D. C., Conn., 1961, Crim. #10,250), Aspelund testified that this delivery occurred sometime in September, 1959. This variation in Aspelund’s testimony at the two trials is the sole basis on which the claim of perjury as to Aspelund is founded. The alleged perjury is said to be material because the cut-off date for purposes of the statute of limitations in petitioner’s trial was September 30, 1959. Romano alleged that the Government “deliberately withheld physical and other evidence which would have aided the defense in uncovering Aspelund’s perjury,” specifically referring to Aspelund’s Union Book and Seaman’s Papers which “were not entered into evidence” (Petitioner’s memorandum of law, submitted in support of the motion, at 17).

The claim of perjury is wholly without merit. At the *Cianchetti* trial, in 1961, Aspelund stated that the meeting with Hedges and Cahill occurred sometime in September, 1959 (A. 111); at petitioner’s trial, in 1969, he gave substantially the same testimony, stating that the meeting occurred toward the end of the year, around Christmas (A. 55-56). Aspelund’s testimony, coming ten years after the fact,* was open to attack on cross-examination like that of any other witness, since the principal impeaching evidence upon which petitioner relies here—the *Cianchetti* transcript—was, and is, a public document available to

* The Government noted below that Romano was not a defendant at the first trial of this indictment in 1965 because he was a fugitive. On appeal, Romano characterizes this assertion as “utterly without foundation” (Br. 13), “baseless and absurd” (Br. 27), and, in what is for him a retreat from hyperbole, merely “disingenuous” (Br. 27). This Court however, stated in its opinion on Romano’s appeal from his conviction: “The Appellants here and two co-defendants were fugitives when the first trial of the indictment took place in 1965.” *United States v. Guanti, supra*, 421 F.2d at 794.

petitioner and his counsel at all times and indeed a copy thereof was in the possession of defense counsel in the courtroom during petitioner's trial (Br. at 28).* Moreover, the other documents and information which Romano cavalierly accuses the Government of suppressing were equally available to him at trial.** The Government, far

* As Judge MacMahon stated in his Memorandum Opinion denying Romano's prior petition:

"The Government has no duty under *Brady* [v. *Maryland*, 373 U.S. 83 (1963)] to turn over contradictory statements of a witness made at a prior trial when the records of that trial are public. *Brady* deals with the suppression by the prosecution of evidence favorable to the accused, and it is clearly inapplicable here because the prosecution could not and did not suppress the transcript of the [prior] trial."

Romano asserts that the prosecutors who tried the case were "fully" aware that his trial counsel was not familiar with Aspelund's prior testimony. There is nothing in the record to support this contention either as to the latter's alleged lack of familiarity or the alleged awareness of the Government. But even if such proof existed, there is no constitutional or other duty imposed on a prosecutor to instruct defense counsel on how to cross-examine a government witness on the basis of his previous testimony which the defense possesses during the trial. See *Williams v. United States*, Dkt. 74-1463 (2d Cir., September 25, 1973), slip. op. 5543 at 5548; *United States v. Ruggiero*, 472 F.2d 599, 604 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States v. Tramunti*, 500 F.2d 1334, 1349-50 (2d Cir. 1974).

** Romano alleged that the Government suppressed Aspelund's seaman's discharge papers. These papers were marked as Government's Exhibit 37 for identification at petitioner's trial, and used to refresh Aspelund's recollection on at least one occasion, see GA. at 1-2; to the extent petitioner believed that the names of the ships on which Aspelund sailed were relevant to his defense, (see A. 4 at ¶ 17(c)), he had only to look at these documents at trial. Aspelund's union dues book, Government Exhibit 38 for identification was also available at trial and one page was marked into evidence as Government Exhibit 38A (see GA. at 3-4). Government's Exhibit 44, a statement given by Aspelund to Agent Dugan of the Bureau of Narcotics on April 18, 1961 relating in part to the 1959 transaction that is the principal focus of Romano's claim, was furnished as 3500 material (GA. 5).

from suppressing evidence, was totally candid in its disclosures to the petitioner and completely satisfied its obligations under *Brady*, the *Jencks* Act and the Federal Rules of Criminal Procedure in timely fashion and in good faith. Against this background, Romano's charges of misconduct are grossly irresponsible.* There is absolutely no showing that Aspelund's testimony at petitioner's trial was perjurious as to this or any other matter. *United States v. Marcello*, 436 F.2d 1221, 1225 (5th Cir.), cert. denied, 401 U.S. 1003 (1971); *United States v. Overton*, 450 F.2d 919, 920 (5th Cir. 1971).

Romano not only misstates the facts, but he misconceives the applicable law as well. Contrary to his assertion (Br. 27), the date of the Aspelund-Hedges-Cahill meeting had no bearing on the statute of limitations issue. The indictment in this case was filed on September 30, 1964. The Government was required to prove, therefore, that at least one overt act had been committed in furtherance of the conspiracy within the five-year period of limitations ranging from September 30, 1959 to September 30, 1964. Although eleven overt acts were charged in the indictment, only the final two related to post-September 30, 1959 acts. Accordingly, the trial judge struck acts 1-9 and charged the jury, with respect to the overt act requirement, that it could not convict any of the defendants unless it found there had been "the commission by any conspirator of either overt act 10 or 11 set forth in the indictment" (GA. 6). Later in his charge, the judge

* Typically, Romano now attacks the District Judge for preventing him from presenting alleged evidence of perjury. He states that he specifically informed Judge MacMahon "that he intended to subpoena certain corporate and government records for presentation at a hearing, records which could provide additional proof of perjury" (Br. 22). Romano offers no explanation why such records were not requested at an earlier date, as they could have been upon proper application to the District Court. See *Harris v. Nelson*, 394 U.S. 286, 290 300 (1969).

instructed the jury to "consider whether the Government has established beyond a reasonable doubt the third element of the crime [of conspiracy] and determine whether at least one of the overt acts, 10 or 11, as charged in the indictment was committed by at least one of the conspirators which advanced the object of this conspiracy" (GA. 7).

Both of the overt acts submitted to the jury involved events occurring in 1960 which were not raised in Aspelund's testimony. Thus Aspelund's trial testimony with respect to the 1959 transaction could have had no effect on the ultimate resolution of the statute of limitations issue. Since the jury found that at least one of the post-September 30, 1959, overt acts charged in the indictment had been committed, testimony with respect to other conspiratorial activities, including Aspelund's testimony concerning the final meeting with Cahill and Hedges, was clearly admissible to prove the existence of a single, ongoing conspiracy commencing in 1956.

As to Romano's claims of withdrawal from the conspiracy, this question was fully discussed and properly resolved by this Court in *Guanti*, 421 F.2d at 798-799.*

* Romano raised several other claims below which the district judge properly concluded were totally without merit. Romano alleged that testimony by Charles Bourbonnais that he was employed as a purser for Trans World Airlines, flying from San Francisco to Paris in 1959, was perjurious (A. 4 at ¶ 16(b)). The charge is based upon nothing more than speculation and such bald and conclusory allegations on the part of a counseled petitioner do not raise issues which require an evidentiary hearing, *see Dalli v. United States*, 491 F.2d 758, 760-61 (2d Cir. 1974); *United States v. Branch*, 261 F.2d 530 (2d Cir. 1958), *cert. denied*, 359 U.S. 993 (1959); *cf. Burris v. United States*, 430 F.2d 399, 402 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). Petitioner also accuses the Government of suppressing Bourbonnais' TWA employment record (A. 4 at ¶ 17(b)). There is no evidence

[Footnote continued on following page]

Thus, it is clear from the records and files in this case that the information Romano now presents to the court was available to him at the time of his trial. Even so, Romano has failed to establish that any of his claims have merit or that a hearing was required. *Dalli v. United States, supra.** Accordingly, the district judge properly dismissed his petition without a hearing.

that the Government ever had such records in its possession, nor has petitioner provided any. Moreover, Bourbonnais' employment record could easily have been subpoenaed by the defendant at trial. Romano and his trial counsel had more than adequate notice of Bourbonnais' testimony concerning his flight route since Bourbonnais gave similar testimony in a previous trial, see *United States v. Arnone*, S.D.N.Y. 64 Cr. 828 (GA. 8-9). Petitioner's charges of perjury concerning those portions of Charles Hedges' testimony which corroborated allegedly perjured testimony of Bourbonnais (A. 4 at ¶ 17(c)), are similarly speculative and unsupported.

Petitioner's remaining collateral claims, charging suppression of unidentified 1963 grand jury minutes (A. 4 at ¶ 17(d)), and subornation of alleged perjury by BNDD Agent Thomas Dugan, are vague, conclusory, unsupported, false and meritless. Neither his memorandum of law below nor his brief on appeal even attempt to rescue his arguments from the realm of the frivolous.

* Romano appears to argue that a claim of perjury in a motion under 28 United States Code § 2255 can never be denied without a hearing (Br. 23). Romano need not even have gone beyond this Court's decision in his first § 2255 petition to realize that his position was totally incorrect. In *Romano v. United States, supra*, Romano's claims of perjury were denied by Judge MacMahon without a hearing, and this court affirmed the decision. The Government could not ask for clearer precedent. See also *Hoffa v. United States*, 339 F. Supp. 388, 393-98 (E.D. Tenn. 1972), *aff'd*, 471 F.2d 391 (6th Cir. 1973).

Indeed, Romano's efforts, including hurling unsupported accusations against prosecutors past and present, misciting trial records, and staking out legal positions that recklessly ignore decisions of this Court, appear to be no more than another attempt to litigate questions concerning the statute of limitations and his alleged withdrawal from the conspiracy, issues conclusively decided against him by the jury at trial and by this Court on appeal. In that effort, one frivolous petition under § 2255 and an equally frivolous appeal from its denial should be sufficient.

CONCLUSION

The order of the district court should be affirmed.

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

DANIEL J. BELLER,
LAWRENCE S. FELD,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Daniel J. Beller being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 23 day of *December, 1974*
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

*Mr. Henry Rothblatt
Rothblatt, Rothblatt, Seijo + Parkin
232 West End Ave
New York, N.Y. 10024*

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Daniel Beller

Sworn to before me this

23rd day of December 1974
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975